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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 895

ABRAHAM CHAIKEZ, *Petitioner*

AGAINST

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	2
Statement of Jurisdiction	2
Statement of the Case	2
Questions Presented	10
Specifications of Errors to be Urged	17
Reasons for Granting the Writ	19
Argument	20
Conclusion	53

Appendix:

Decision of Court of Appeals Below	1a
Constitutional Provisions, Statutes and Rules Involved	7a

TABLE OF CITATIONS

CASES:

Altruda v. U.S., 224 F.2d 935	26
Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 89, 97 L.ed. 1244	30
Barry v. U.S., ... U.S. App. D.C. ..., No. 15765, Dec. 1-12-61	19, 41
Berger v. U.S., 295 U.S. 78, 55 S.Ct. 629, 79 L.ed. 1314	48
Bihn v. U.S., 328 U.S. 633, 90 L.ed. 1485	54
Bollenbach v. U.S., 326 U.S. 607	40
Boyd v. U.S., 142 U.S. 450	47
Bryan v. U.S., 338 U.S. 552, 70 S.Ct. 317, 94 L.ed. 353, affirming 175 F.2d 637	21, 23, 26
Burgman v. U.S., 88 App. D.C. 184, 188 F.2d 637	29
Clyatt v. U.S., 197 U.S. 207	41
Crawford v. U.S., 212 U.S. 183, 20 S.Ct. 260, 53 L.ed. 465	28
Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 437, 97 L.ed. 469	30
Dennis v. U.S., 339 U.S. 162, 70 S.Ct 519, 94 L.ed. 734	29

Page

Diaz v. U.S., 223 U.S. 442 ..... 19, 43
Dorsey v. U.S., 108 U.S. App. D.C. ....., 281 F.2d 71 .. 19, 52
Dupree v. U.S., 218 F.2d 781 ..... 19, 23, 24
Elder v. U.S., 213 F.2d 876 26
Ex Parte Milligan, 71 U.S. 2, 4 Wall. 2, 18 L.ed. 281 ... 28
Fillippon v. Albion Vein Slate Co., 250 U.S. 76 43
Fisher v. U.S., 328 U.S. 463, 66 S.Ct. 1310, 90 L.ed. 1382 ..... 19, 41
Frazier v. U.S., 335 U.S. 497, 69 S.Ct. 201, 93 L.ed. 187 ..... 29, 30
Gordon v. U.S., 344 U.S. 414, 97 L.ed. 447 53
Greenberg v. U.S., 280 F.2d 472 ..... 46.
Hargett v. U.S., 183 F.2d 859 47
Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.ed. 866 30
Holland v. U.S., 348 U.S. 121, 75 S.Ct. 127, 99 L.ed. 150 ..... 5, 9, 11, 19, 20, 21, 22, 39
Hopt v. Utah, 110 U.S. 574 ..... 19, 43
James v. U.S., 238 F.2d 681 ..... 19, 32
Lewis v. U.S., 146 U.S. 370 ..... 19, 43
McClanahan v. U.S., 272 F.2d 663 ..... 19, 42
Mesarosh v. U.S., 352 U.S. 1, 77 S.Ct. 1 51
Mossew v. U.S., 266 F. 18 53
Old Colony v. Comm. of Int. Rev., 357 U.S. 28 50
Ovama v. California, 332 U.S. 633, 68 S.Ct. 269 30
Paris v. U.S., 26 F. 529 46
Patten v. Miss., 332 U.S. 463, 68 S.Ct. 184, 92 L.ed. 76.. 30
Remmer v. U.S., 347 U.S. 22, 74 S.Ct. 450, 98 L.ed. 654 45
Screws v. U.S., 325 U.S 91 34
Shields v. U.S., 273 U.S. 583, 47 S.Ct. 478 43
Snyder v. Massachusetts, ... U.S. ...., 54 S.Ct. 330 19, 43
Spies v. U.S., 317 U.S. 492, 87 L.ed. 418, 63 S.Ct. 364.. 19, 32
Steele v. U.S., 222 F.2d 628 ..... 19, 26
Steward v. U.S., 101 App. D.C. 51, 247 F.2d 42 41
Tatum v. U.S., 88 App. D.C. 386, 190 F.2d 612 41
U.S. v. Atkinson, 297 U.S. 157 41
U.S. v. Brown, 179 F. Supp. 478 45
U.S. v. Chaifetz, 181 F. Supp. 57 ..... 2, 19, 20
U.S. v. Chaifetz, ... U.S. App. D.C. ...., No. 15662, Dec. 11-10-60 ..... 20, 53
U.S. v. Donovan, D.C. Va. 1956, 142 F. Supp. 703 24

Page

U.S. v. Fedwick, 177 F.2d 488 22
U.S. v. Henson, 179 F. Supp. 474 45
U.S. v. McCue, 160 F. Supp. 595 ..... 19, 32
U.S. v. O'Connor, C.A. 2, 1956, 237 F. 2d 466 ..... 19, 24
U.S. v. O'Malley, D.C. Pa. 1955, 131 F. Supp. 409 24
U.S. v. Riganto, 124 F. Supp. 158 24
U.S. v. Rully, 143 F. Supp. 283 ..... 12, 24
U.S. v. Shotwell Mfg. Co., 355 U.S. 233, 78 S.Ct. 245 51
U.S. v. Ward, 169 F.2d 460 26
U.S. v. Williams, 208 F.2d 437 ..... 19, 24
U.S. v. Wood, 229 U.S. 123, 57 S.Ct. 177, 81 L.ed. 78 29
Vloutis v. U.S., CA-5-1955, 219 F.2d 782 24
Williams v. U.S., 76 App. D.C. 200, 131 F.2d 21 41

CONSTITUTION, STATUTES AND RULES:

United States Code:
Section 3237(b) of Title 18 3
Section 145(a) of Title 26 (1939 Int. Rev. Code) 2, 14, 31, 32, 52
Section 145(b) of Title 26 (1939 Int. Rev. Code) 3, 37
Section 811 (c) and (d) of Title 26 ..... 33, 39
Section 1000 of Title 26 ..... 14, 39
Section 7201 of Title 26 (1954 Int. Rev. Code) 3
Section 7203 of Title 26 (1954 Int. Rev. Code) 2, 31, 52
Section 1254(1) of Title 28 2

D.C. Code, 1951 ed.:
Title 11, Section 1420 ..... 13, 29

Federal Rules of Criminal Procedure:
Rule 31(c) 10, 13, 19, 31
Rule 37(c) 2
Rule 43 ..... 10, 15, 19
Rule 52(b) 19, 25, 41

United States Constitution:
Fourth Amendment 9
Fifth Amendment 9, 42
Sixth Amendment 9, 28

MISCELLANEOUS:

46 American Bar Association Journal 1311, Dec. 1960 28

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ABRAHAM CHAIFETZ, *Petitioner*

AGAINST

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Abraham Chaifetz, an attorney at law in the District of Columbia, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered November 10, 1960, affirming a judgment of conviction on two counts of a five count indictment charging income tax evasion, wherein he was found guilty by a jury of violating *26 U.S.C. Sect. 145* (b) (*1939* I.R.C.) for 1953 (Count 3), and of a purported "lesser offense" in violation of *26 U.S.C. Sect. 7203* (1954 I.R.C.) for 1954 (Count 4). Petitioner was acquitted of tax exasion charges for 1951, 1952, 1954 and 1955.

Petitioner was sentenced to a prison term of 4 to 12 months and to pay a fine of $10,000 on Count 3, and to a

prison term of 4 months and to pay a fine of $10,000 on Count 4, with the latter fine suspended, and the prison term on Count 4 to run concurrently with Count 3.

Petitioner is presently enlarged on bail in the sum of $1,000.00.

THE OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and appears at R.890-896. The opinion of Youngdahl, J., the trial judge, denying petitioner's motions for a judgment of acquittal, or, in the alternative, for a new trial, is reported at *181 F.Supp.57* and reproduced at R.820-825. On May 5, 1959, Tamm, J. District Judge, wrote a memorandum opinion denying petitioner's motions for a Bill of Particulars and to Suppress certain evidence and records obtained through fraud and misrepresentation by revenue agents in the case. The opinion is not reported but is reproduced in R.55-60.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 10, 1960; a timely petition for rehearing en banc (R.898-911) was duly filed within the fifteen day period allowed under the Rules of that court and was denied on December 7, 1960. (R.912)

On December 29, 1960 this Court granted an extension of time within which to file this petition for a writ to February 5, 1961.

The jurisdiction of the Supreme Court is invoked under *28 U.S.C. sec. 1254 (1)* and *Rule 37 (c)* of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Your petitioner Abraham Chaifetz, a member in good standing of the District of Columbia bar, was indicted by a grand jury in Baltimore on January 7, 1958 accusing him

of attempting to defeat and evade the payment of income taxes by filing false and fraudulent returns for the years 1951 through 1955 under *Secs. 145 (b)* of the 1939 Internal Revenue Code and 7201 of the 1954 I.R. Code.

Defendant's motion to transfer the case to Washington, D.C., where he resides, was granted under authority of *18 U.S.C.A. 3237* (b) 1958 Supp. after a blanket plea of not guilty was entered.

In seeking an explanation for the accusations and more detailed information concerning the charges, Chaifetz was furnished an illegible, handwritten photocopy of what he was told was the net-worth chart the prosecution intended to use at his trial.

A motion for a better bill of particulars seeking a clarification of the charges including some forty specific items of alleged unreported income for the five year period and a prayer that the court suppress the evidence and records obtained from the defendant because of the use, by the Revenue agents, of fraud, misrepresentation and deception, was denied on May 7, 1959 by Tamm, J. who noted that such broad relief was not necessary since the government advised and promised the court the case was of the "net-worth" type and would be prosecuted as such. R. 61.

At the request of the trial court, one day prior to the opening of the case, defendant's counsel and the prosecution met in the chambers of the trial judge and entered into certain stipulations pertaining to a number of undisputed assets belonging to and claimed by the defendant.

Despite this agreement, when the trial started, the prosecutor paraded eighty-seven subpoenaed witnesses before the unselected jury, although forty-four of these witnesses were mere custodians of records already stipulated to by both sides, and sought to excuse his conduct by stating that "he hadn't had enough time to cancel out the unnecessary subpoenas in order to avoid the confusion" that surrounded the opening day.

None of the forty-four were ever called upon to testify.

From that jury panel, over the denial of defendant's motion to strike all federal government employees, and from a panel denuded of every person who was either Jewish or had a Jewish sounding name, as a result of the prosecution's use of its peremptory challenges, a jury dominated by ten federal employees was selected.

Once the trial was under way, the government without any notice to defendant, introduced a *new* worth chart with several changes made thereon. The defendant's objection to the introduction of this evidence, which was different from the chart furnished him at the time of the indictment, and now seen for the first time was over-ruled, and taking full advantage of this arbitrary ruling, the prosecution amended this second chart several times during the trial, tacitly admitting that some errors had to be corrected.[1]

For the entire six week period that the trial lasted, the prosecutor daily wheeled in the "evidence" he intended to use against the defendant, using a supermarket type of grocery cart, piled high with papers and records that for the most part were never used.*

Against this unfair and unwholesome environment the defendant was made to stand trial.

The prosecution relied in the main, on the testimony and assumptions of Revenue agent John Hein and Special agent McIntyre who were permitted to relate their activities and

[1] Compare Def. Exh # 41, the illegible, handwritten reduced in size copy of net worth chart furnished him, and Gov. Exh. # 66, the typed chart introduced at the trial and changed during the trial. (R. 845-847; 881-884)

* When Hein was on the stand and unable to answer a question which would have been favorable to the defendant or sought to avoid the situation by claiming sudden loss of memory he attempted to change the tenor of the questioning by referring to the basket of evidence, . . ."

findings from the time Hein was assigned to the case to conduct a 'routine audit' for the year 1951 until the indictment was filed. It became apparent that either Hein or McIntyre, or both were committing perjury after each had been caught making conflicting statements concerning their findings and methods used to entrap and ensnare the defendant.

This did not deter the government very long because when it became clear that the "net-worth" case had been destroyed by the testimony and evidence of the defendant and even some of the government's own witnesses, the prosecutor over defendant's objections, attempted to prove Chaifetz guilty of the felony charged for each year by the 'specific-item' method,—a method he had been precluded from using by the court and by his own choice.**

At the close of the prosecution's case, the defendant made a motion for a directed verdict of acquittal because the government had failed to prove its case as required under the *Holland* v. *U.S. Rule*. The motion was denied.

Defendant was therefore forced to put on his proof to show that the government failed in its investigation to determine his true net-worth and proved that the agents had been completely deficient under the duties required of them in order to sustain a net-worth conviction. Defendant proved the agent's refusal to follow up the "leads" furnished them by Chaifetz, and, that they had omitted from the net worth charts many assets which explained the alleged increase in the net worth computations as *assumed* by the

** In the Government's opening statement, the prosecutor denominated the case as a "net-worth" case and promised to prosecute it as such, R. 67. At a bench conference, prosecutor was reminded by the court how and under what manner the case was to be prosecuted. When Tamm, J. denied the defendant's motion for a better bill of particulars and for other relief, he noted the denial stemmed from the fact that the government advised the court that under the networth theory, the request of the defendant was unnecessary and immaterial to the issues tried in a net-worth case.

prosecution. Then having thoroughly discredited the veracity of the agents through corroborated and undisputed testimony and evidence, the defendant renewed his motion for a directed verdict of acquittal on the same grounds as argued at the end of the government's case. This motion was also denied.

Several prayers offered as instructions to the jury by the defense were refused. The trial court gave a charge which was disjointed, filled with innuendos how the defendant could be found guilty but almost void as to what the jury should look for in order to find the defendant innocent. Several errors in the interpretation of the Internal Revenue laws were pronounced, regarding gift taxes, and what constituted income, etc., and other basic principles connected with a fair charge were missing. This dissertation took two-and-one-half hours after which the jury was locked up overnight.

During the deliberation period, the jury requested three items for examination which the court complied with. However, a fourth matter, that of the jury seeking to examine a certain letter sent by the Philadelphia office of the Internal Revenue to the Washington office seeking information concerning defendant's disclosure of assets claimed to have been omitted by the agents during their investigation, was acted upon in a manner which calls for a reversal of the conviction.

Although the document in question had been marked by the Court as "Def. Exh. 60 for identification," when the jury requested it, the trial court returned the request with the following instruction, "* * * *jury was informed that no such exhibit existed.*" To compound the error, the court failed to notify defendant of such request, and it was sent in without his knowledge or consent, in his absence.

The jury recorded its verdicts for all of the five counts on special forms furnished by the court. (R 806) The defendant was acquitted for 1951, 1952, and 1955. He was found

guilty as charged (guilty of the felony) for 1953, and on count four (1954), the written and oral verdict indicated that the defendant was "guilty of failing to supply information required by law." This was, the court presumed, a verdict of guilty of the "lesser-included offense" for 1954, but as your petitioner will point out in his argument, the verdict was a nullity since it found him guilty of an act which is not a crime, since an essential ingredient of the lesser-included offense was missing, namely, "willfulness!"

At the time the court entertained the defendant's motion for acquittal n.o.v. or in the alternative a motion for a new trial, former defense counsel reported to the court at the express direction of the defendant, that the deputy marshal attached to the trial court had committed acts of misconduct and entered into improper conversations with members of the jury during the trial, a fact reported in the first instance by an alternate juror to former defense counsel immediately after the trial. Defendant was unaware that upon being pressed by the court as to what he wanted to do about this matter, former defense counsel pleaded, among other things, that the report was not in final form and besides he had not come to a financial arrangement with the defendant concerning any appeal or further prosecution. (See record 812.) Defendant learned about this when he received the transcript of the proceedings some three months later. (The reporter in this instance had resigned after the trial, gone to Texas, and when contacted for a copy of the proceedings, demanded his fee in advance and on about March 16, 1960, the reporter filed a copy of the proceedings. (R 811-819).

On February 19, 1960, Chaifetz was sentenced to serve a jail term of four to 12 months and fined ten thousand dollars on count three (1953) and given a sentence of four months and fined ten thousand dollars on count four with the fine suspended and the jail sentence to be served concurrently with the sentence pronounced under count 3. From this sentence and conviction your petitioner appealed

to the Court of Appeals for the District of Columbia, and in a seven page opinion, the Appeals Court ignored the several errors complained of and concentrated on the lesser-included offense issue raised by the defendant and affirmed the judgment of the trial court. The defendant's petition for a rehearing en banc was denied on December 7, 1960 and from that denial and the judgment your petitioner seeks relief, based on errors *of such severity* that this Court ought to correct and reverse in the interest of true justice.

During the trial, defendant was limited to four character witnesses and was restricted from offering a reasonable number who were ready, willing and able to testify to his good character. In this type of case such testimony bears a tremendous amount of weight since the Government's case was based on circumstantial evidence.

Medical testimony was introduced showing that the defendant suffered from an aggravated uncontrolled diabetic condition, high blood pressure, migraine headaches, lapses of memory, comas, and a personal mental situation brought about by a divorce and culminating in his father's death on December 30, 1953. The explanations and proof offered by the defendant remained uncontradicted throughout the trial and nowhere was the prosecution able to prove that the defendant had willfully intended to evade taxes by filing the alleged false and fraudulent returns. Still, on the record, and until it is corrected, he stands convicted.

Petitioner seeks vindication and his freedom from charges resulting in a flagrant miscarriage of justice that only this Court can correct.

Petitioner seeks the correction of errors committed by the United States District Court for the District of Columbia in the first income tax evasion case ever prosecuted in Washington, D.C. by an Assistant U.S. Attorney trying his first income tax evasion case and presided over by a federal District Court judge sitting on his first case of this

type. The "expert" witness used by the government in its attempt to prove the defendant guilty was an unqualified revenue agent who admitted that this was the first income tax evasion case in which he had ever testified.

This case is of national importance involving prosecutions under the Internal Revenue Code, and flagrant violations against the defendant's Constitutional rights under the Fourth, Fifth and Sixth Amendments to our Constitution.

The case involves denial of a defendant's right to be informed of the nature of the charges against him; the right to be tried by a fair and impartial jury; and rights denied him under the "due process" clause. It involves too the abuse of the "net-worth" method of prosecution in a tax evasion case contra to the rule laid down by this Court in *Holland* v. *U.S.*, 348 U.S. 121, 75 S. Ct. 127, and the switching by the prosecution from the "net-worth" method to the "specific-item" method, although defendant had been denied the information concerning the specific items on his motion for a better bill of particulars because of the prosecutor's statement to the courts below that the instant case would be prosecuted solely on the net worth theory.

The case concerns itself further with the Trial Court's refusal to follow the rule laid down in the Holland case, supra, as to when the case is to be taken from the jury. The prosecution failed to follow principles necessary to conviction in a "net-worth" case, such as tracking down "leads" furnished by defendant, properly including all assets, and not wilfully omitting assets.

The case involves the failure of the Trial Court to take cognizance of the misconduct and improper conversations had with members of the jury by his deputy marshal after such facts had been reported by former defense counsel after the trial.

The case presents the question whether, in a long and complex case, based on circumstantial evidence, the Trial

court can arbitrarily restrict the number of character witnesses, and then have the trial court refuse to explain such restriction to the jury; and concerns itself with the improper instructions given by the court concerning certain provisions of the tax laws, improper instructions as to how the defendant could be found guilty but failing to properly balance the charge with how the defendant could be found innocent; the refusal to instruct the jury on the "lesser included" offense in violation of Rule 31 (c) of the F.R. of Cr. P. and the violation of Rule 43 FRCP, by the improper secret instruction to the jury in the absence of defendant, which was incorrect and untrue and without the knowledge, consent or waiver of the defendant, all errors then capped off by the sentencing of the defendant to a prison term for a "crime" that does not exist and for which no punishment is provided anywhere.

For all of the above certiorari is sought.

QUESTIONS PRESENTED

Against the background of the summary statement your petitioner states that the following questions are presented:

1. Did the Trial Court commit prejudicial and reversible error in permitting a "net-worth" income tax prosecution to go to the jury

(A) where the Trial Court never instructed the jury to acquit the defendant if the government failed to prove a net worth case?

(B) where the government failed to establish a 'firm' opening net-worth for the base year through deliberate, erroneous and improper omission of substantial non-taxable assets sufficient to account for and explain the alleged increases in the subsequent net worth computations for the years involved?

(C) where the government failed to produce any witness who could testify to the correct definition of a "load"

as applied to net worth tax investigations, and where the government's own witnesses, testifying as the Revenue agents and "experts" assigned to the instant case, admitted that they failed to run down and or ignored the "leads" furnished them by the taxpayer relative to his additional assets as required under the *Holland* v. *U.S.* rule?[1]

(D) where the government failed to prove the defendant guilty beyond a reasonable doubt at the end of the prosecution's case and again at the end of appellant's presentation of his defense as required under the *Holland* case rule?

(E) where the government failed to prove that any additional tax was due from taxpayer and offered instead net worth charts erroneously prepared, from incomplete and improperly made investigations, by its "expert" witnesses who admitted that the calculations were based on *assumed* net worth increases, after defendant had proved the charts to be incorrect and incomplete on account of the deliberate, unwarranted and erroneous exclusion of defendant's known assets?

(F) where the government was unable to overcome taxpayer's proof that his net worth was *greater* at the starting or opening (base year) point than the government claimed either at the starting point or at the end of the third (middle) year of the prosecution period?

(G) where the government, having failed to prove the defendant guilty under the "net worth" theory, was allowed then to proceed, over defendant's objection, to demand conviction and offer testimony tending to prove defendant guilty via "specific items," which had been admitted only to show wilfullness, when in fact the "specific items" were proven in the main, not to be concealed or hidden but unreported through negligence, oversight, mistake and other

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[1] *Holland* v. *U.S.* 348 U.S. 121, 75 S. Ct. 127

legally acceptable mitigating circumstances and at other times reported in the wrong year?[2]

2. Whether a conviction for the middle year in a five year income tax evasion case based on and prosecuted under the "net worth" theory can stand where defendant has been acquitted for all of the other years and when no unwarranted increase in the net-worth for the third year was proven by the prosecution? (See also query (F) of the first question presented.)

3. Did the Trial Court commit prejudicial and reversible error by allowing the incorrect and incomplete net worth charts containing several discrepancies and omissions to be taken into the jury room knowing that the charts, instead of being a *summary* of the evidence, were in fact but lists of opinions and assumptions prepared by and decided upon by the prosecution's discredited "expert" witnesses?

4. Whether the defendant was denied a fair trial and afforded due process

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[2] Interest or dividend payments credited to taxpayer's account on December 31st was not reported in that year, but reported by the taxpayer in the following year when he actually received the notice and check. The prosecution claimed this was an act showing willful intent.

"* * * In a prosecution for income tax evasion where the government relied on the "net worth" method, the ultimate burden was on the government. * * * If the government chooses to ignore a genuine lead, the trier cannot find that no sufficient funds came from that source. If the government follows up that lead and is unable to establish that a sufficient amount did or did not come from that source, it must at least show that it was not within the range of reasonable probability that sufficient funds came from that source to account for the apparent understatement of income. * * * Review of the evidence fails to support that finding as sufficiently well founded. The findings are based on estimates without sufficient basis in proof to establish guilt beyond a reasonable doubt." *U.S.* v *Ruth*, 13 F Supp 283

(A) when the Trial Court restricted defendant to four character witnesses and refused to properly instruct the jury as requested that the reason for only four witnesses appearing to testify as to defendant's character was because of the court's own restriction and not because of defendant's inability to offer many more prominent and noteworthy ones among which were many members of the Bar and the Hon. F. Dickinson Letts, United States District Judge, all of whom were ready, willing and able to testify in behalf of defendant,—thus depriving defendant of the opportunity to create a reasonable doubt as to his guilt in a case based on circumstantial evidence and where the weight of character testimony is significantly important.

(B) by the Trial Court's refusal to grant, prior to the start of the trial, the defendant's motion to strike all Federal Government employes from the jury panel because of patent bias and prejudice which could be magnified in this type of a case since the 'triers of the facts' were employees of the prosecution and had a direct interest in the outcome of the case.[4]

(C) by the Trial Court's refusal to properly instruct the jury on the "lesser-included offense" as required under *Rule 31 (c), F. R. of Cr. P.*, for *all* of the five years noted in the indictment and restricting such instruction (for the

[4] The fact that Congress provided that Government employees are now qualified to sit on a criminal jury (*D.C. Code, 1951 ed.* as amended, *Title 11, sec. 1420*)—does not mean that they *must* sit, but that they are not now disqualified to serve as jurors in a criminal trial,—provided the accused is not thereby deprived of an impartial jury.

> "• • • federal employees could sit as jurors in a criminal trial,—except, if at all, only in the rarest and most extraordinary combination of circumstances." *Frazier* v. *U.S.*, 335 U.S. 497 @ 511, 512, 69 S. Ct. 20.

Your petitioner contends that the instant case reveals that it falls into the category of the 'rarest and most extraordinary combination of circumstances.'

"lesser-included offense") to the years 1954 and 1955 maintaining that to give such instruction for the earlier years (1951, 1952 and 1953) was improper because those years were barred by the statute of limitations.

(D) by the Trial Court's erroneous conception and construction of the charges involved thus prejudicing defendant's right to acquittal when it (the Trial Court) failed to recognize the difference between the court's power to punish for a violation of the law and the right of a jury to find the defendant guilty or not guilty of the *actual* violation committed (if any), as shown by the evidence and proof.

(E) by the Trial Court's refusal to give *any* instruction for the years 1951, 1952 and 1953, to the extent that if the jury found that the defendant had committed only the "lesser-included" offense—(*sec. 145 (a)- 1939 Internal Rev. Code, Title 26, U.S.C.A.*), which was barred by the statute of limitations,—it had to acquit the defendant for those years.

(F) by the Trial Court's erroneous and prejudicial use of different forms for returning the verdict for the first three years, which included 1953, and restricting the verdicts to that of only guilty or not guilty of the *felony* charged in the indictment, thus implying that the "lesser-included" offense was in no way involved for the first three years.

(G) by the Trial Court's incorrect and improper instructions given with respect to the "gift tax" law provisions of the Internal Revenue Code. (*sec. 1000, Title 26*, 1939 I.R.C., 26 U.S.C.A.) thereby allowing a question of law to be decided by the jury instead of by the court (as to whether or not a gift tax return should have been filed by the defendant for 1953)—instead of instructing and advising the jury that the critical issue was, not whether the defendant should have filed a gift tax return for the year involved, but whether he had in fact received certain monies from his father in 1953 prior to his (the father's death); thus lead-

ing the jury to believe and decide that (a)--if no gift tax return was filed then the defendant did not receive the money, or (2) if he did receive the money, he was guilty of willful evasion by not reporting that income.

(H) where the Trial Court instructed the jury that, even though there was no unwarranted increase for any year, the jury still could find the defendant guilty merely by finding that he had omitted certain specific items of income and therefore had filed a false and fraudulent return.

(I) where the Trial Court in direct violation of *Rule 43* of the *F. R. of Cr. P.*,[5] and in the absence of and without the knowledge of the defendant, sent in a secret, erroneous and untrue instruction to the jury during its deliberation advising that an important document, favorable to the defendant 'did not exist'--when in fact it was very much in existence, had been marked in the clerk's records as Defendant's Exhibit #60 for identification and was the subject of discussion between the court and counsel for both sides and exhibited to a government witness who was questioned about same during the trial.

(J) by the Trial Court's failure and refusal to investigate the charge of misconduct and improper communications with the jury lodged against the deputy marshal attached to the Trial Judge's court by former defense counsel at the specific request of the defendant after such improper and prejudicial acts were reported to defense counsel immediately after the trial.

(K) by the Trial Court's admission, over defendant's objection, of opinion evidence and incomplete tax data pertaining to defendant's prior tax years not covered by the indictment, permitting the implication to be passed on to the jury that the defendant was guilty of tax evasion for

[5] *Rule 43, F.R. Cr. P.*—PRESENCE OF DEFENDANT. The defendant shall be present • • • at every stage of the trial • • •.

prior years as well, for the sole purpose of inflaming the jurors against the defendant.

(L) where the prosecution was permitted to indulge in unwarranted and unfair tactics during the trial among which was (a) the 'parading' of eighty-seven prospective witnesses before the jury panel although more than half (44 to be exact), did not testify and were mere custodians of records whose testimony had been stipulated to prior to trial;—(b) 'parading' the "evidence" against the defendant by rolling that "evidence" into the courtroom in a supermarket type of grocery cart piled high with papers, the greatest amount never being used, and repeating this ritual for the entire six weeks period that the trial lasted; and (c) testifying from the floor without being sworn as to facts not within his own knowledge by examining government witnesses, one in particular, the defendant's brother, so as to create a racial and anti-semitic atmosphere by asking,—"isn't it a fact or isn't it true that you and your mother spoke in YIDDISH the day the revenue agents came to see you about your brother?"—when such tactics did nothing but add fuel to the fire of prejudice being built up against the defendant.[6]

(M) by the Trial Court's failure to suppress and deny the admission of evidence against the defendant which had been secured through fraud, misrepresentation and deceit,

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[6] Not a single person of the Jewish faith or one having a name that sounded Jewish was left to be chosen from the jury panel because the prosecution through its exercise of peremptory challenges had them stricken.

The Trial Court admonished the prosecutor for this patent prejudicial incident; denied defendant's motion for a mistrial; and enlarged the issue that had been silent throughout the entire trial by an unnecessarily extended instruction to the jury on the point that the defendant's religion was immaterial to the issue. But the prosecution thought it important enough to make sure that not a single person of the defendant's faith would be in the jury box when the trial started.

especially after the agents assigned to the case had given conflicting testimony which in turn was proven to be incorrect, incomplete and in many instances untrue.

5. Whether a conviction of a purported "lesser-included offense "and the sentence thereon,—conceded" to be erroneous by the government—should be allowed to stand, where the verdict of the jury, in its written form and as orally pronounced by each juror upon being polled, established beyond any and every doubt that the defendant did not commit *any* crime or violate *any* law under the Internal Revenue Code.

SPECIFICATIONS OF ERRORS TO BE URGED

The Trial Court erred:

1. In denying the motion to suppress evidence obtained by fraud and misrepresentation.
2. In denying the motion for a Bill of Particulars where defendant sought clarification of the charges brought against him.
3. In denying inspection of documents.
4. In denying defendant's motion to strike all government employees from the jury panel.
5. In denying defendant's motion for judgment of acquittal at the close of the Government's case.
6. In denying defendant's motion for judgment of acquittal at the close of defendant's case.
7. In denying defendant's motion for judgment of acquittal n.o.v., or in the alternative for a new trial.
8. In permitting the prosecution to amend the evidence (the net worth chart)—furnished the defendant, after indictment.
9. In permitting the prosecution to amend an amended net worth chart after the trial had begun.

10. In permitting erroneous net worth charts to be taken into the jury room.

11. In giving the jury a secret and erroneous instruction in the absence of the defendant.

12. In giving incorrect and erroneous instructions to the jury on crucial issues. (gift taxes, lesser included offenses, etc.)

13. In failing to instruct on vital and fundamental issues in the case.

14. In failing to instruct the jury in an unbiased and fair manner.

15. In ignoring the misconduct of the marshal attached to his Court and failing to investigate the charges lodged against the marshal.

16. In refusing to grant a mistrial after the prosecutor committed prejudicial error by injecting a religious issue into the trial.

17. In permitting the prosecutor to commit unwarranted, prejudicial acts and allowing improper remarks to go unpunished or stricken in the examination and cross examination of witnesses.

18. In arbitrarily restricting the number of character witnesses and refusing to properly explain the reason to the jury.

19. In punishing the defendant by sentencing him to a prison term and a fine for a violation of law that does not exist. (count 4)

REASONS FOR GRANTING THE WRIT

The Court below has rendered a decision in conflict with other Circuit Courts of Appeals.[1]

The Court below has decided important questions of law contrary to earlier *and later* decisions of that court and has decided important questions of Federal law in conflict with applicable decisions of the Supreme Court.[2]

The Court below has permitted and sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for the exercise of this Court's power of supervision.

The decision of the District Court and the affirmance by the Court of Appeals for the District of Columbia Circuit is in conflict with the Federal Rules of Criminal Procedure, 31 (c), 43 and 52 (b) and decides two questions of general importance and substance relating to the construction and application of the Federal Constitution and statutes in a manner that is contrary to the applicable decisions and mandates of the Supreme Court.[3]

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[1] In trying and reviewing tax evasion cases prosecuted under the "net worth" method. Cf. *U.S.* v. *Chaifetz*, 181 F. Supp. 57, with *Holland* v. *U.S.*, 348 U.S. 121, 75 S. Ct. 127, 99 L. ed. 150; *Dupree* v. *U.S.*, (CCA-5-1955) 218 F. 2d. 781; *U.S.* v. *O'Connor*, (CA2-1956) 237 F 2d 466; *U.S.* v. *Williams*, (CA3-NJ) 208 F 2d 437; *Steele* v. *U.S.*, (CCA-5, 1955) 222 F 2d 628; and others noted in the petition.

[2] *Holland* v. *U.S.* (supra); *Dorsey* v. *U.S.* 108 U.S. App. D.C.——, # 15709, decided June 30, 1960, 281 F. 2d 71; and *Barry* v. *U.S.* #15765 US App. D.C. not yet reported, decided Jan. 12, 1961.

[3] *McCue* v. *U.S.*, 160 F. Supp. 595 (DC Conn. 1958); *Spies* v. *U.S.*, 317 U.S. 492, 63 S. Ct. 364, 87 L. ed. 418; *James* v. *U.S.*, 238 F. 2d. 681, *McClanahan* v. *U.S.*, (CCA-5, 1959) 272 F 2d 663; *Lewis* v. *U.S.* 146 US 370; *Diaz* v. *U.S.*, 223 U.S. 442; *Hopt.* v. *Utah*, 110 U.S. 574; *Snyder* v. *Comm. of Mass.*, 54 S. Ct. 330; *Fisher* v. *U.S.* 328 US 463, 66 S. Ct. 1310, 90 L. ed. 1382

ARGUMENT

I. It Was Error to Submit to the Jury a "Net Worth" Tax Evasion Case Where the Government Failed to Establish a Firm Opening Net Worth, Or Any Unwarranted Increase In Net Worth, Omitted Substantial Additional Opening Assets and Failed to Run Down "Leads" Furnished by Defendant.

In spite of the rules spelled out in *Holland* v. *U.S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, outlining the criteria for the guidance of Federal courts in trying and reviewing tax evasion cases prosecuted under the "net worth" theory, the Court of Appeals, by affirming the judgment of the District Court in *U.S.* v. *Abraham Chaifetz*, 181 F. Supp. 57, aff'd .... U.S. App. D.C. ...., No. 15,662, decided November 10, 1960, ignored and refused to follow, every rule laid down by the Supreme Court in *Holland*.

The Supreme Court while permitting the use of the net worth method of proving income tax evasion cases, has pointed out the dangers to a defendant where such a theory is used.

> "* * * we must start with the basic premise that careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use. * * * Appellate courts should review net worth cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation * * *" *Holland* v. *U.S.*, *supra*.

Where the Government undertakes to prosecute a tax evasion case by using the net worth method, even though this, in effect, shifts the burden to the defendant to prove his innocence, the prosecution still has the burden of certain duties and obligations before even a *prima facie* case can be established.

First, the prosecution must establish a firm and accurate figure as defendant's net worth at the starting point.

Second, the Supreme Court said in *Holland* that the government may NOT disregard a taxpayer's explanation of the source of net worth increases when such explanations are reasonably susceptible of being checked, because increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. Further, this Court said, the government has a DUTY to investigate leads furnished by the taxpayer.

When the agents failed, as they did here, to track down the leads furnished by defendant, it was the duty of the trial judge to direct a verdict of acquittal, instead of requiring defendant to prove the leads previously furnished. When the defendant later proved that the leads were true, and that he had some $37,000 in additional assets at the starting point omitted by the agents, there was no excuse for the trial judge to refuse to direct a verdict. But refuse he did.

The failure of the government's net worth, coupled with the failure of the Agents to run down leads furnished by defendant, was alone sufficient to require a judgment of acquittal by direction of the court. *A fortiori*, where as here, the defendant affirmatively established the omission by the agents of opening assets more than sufficient to explain the alleged increase in net worth.

In *Bryan* v. *U.S.* (CA Fla 1949), 175 F.2d 223, aff'd 338 U.S. 552, 70 S.Ct. 317, 94 L.ed. 335, the court there said:

> "* * * Where the government's net worth computation for the starting point is affirmatively shown to be erroneous and to have excluded assets at the starting point which account for the alleged increase in net worth; or putting it in another way, where the purported increase in net worth is nothing more than the excluded assets owned by the defendant at the starting point, but excluded in the government's computation, then the government has failed to prove a case on the 'net-worth' basis."

In *U.S.* v. *Fenwick*, (CA 7-1949) 177 F. 2d 488, the court there stated:

> "• • • Where the government has failed to prove with reasonable accuracy the defendant's net worth at the beginning and where there is no proof that defendant had not accumulated cash or assets other than those credited to him, over prior years, • • • the government has failed to establish • • • the guilt of the defendant (as required under the Holland case rule). • • •"

From the evidence in the Chaifetz case, no reasonable man could have found that the government had established either a *firm* starting point or that he did not have the additional assets claimed at the beginning of the base year, because your petitioner proved by undisputed testimony and evidence that he had substantially more assets *five* years before the starting point and that he had some $37,000.00 more assets at the beginning of the year 1951, the first year of the prosecution period—$37,000.00 more than was credited to him by the government in its net worth computations!

—o—

In the *Holland* case, *supra*, this Court stressed and pointed out that:

> "• • • the government may not disregard a taxpayer's explanations of the source of net worth increases when such explanations are reasonably susceptible of being checked (because increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income) • • • (and) "the government has a duty to investigate the leads furnished by the taxpayer. • • •, which, if true, would establish the taxpayer's innocence. *When the Gov. fails to show an investigation into the validity of such leads, the trial court may consider them as true and the Government's case insufficient to go to the jury.* • • • (Emphasis supplied) 75 S. Ct. at 135.

Indeed, this rule has been said to be designed to aid in forestalling unjust prosecutions and to have the practical effect and advantage of eliminating the dilemma, especially serious in net worth cases, of the accused being forced to come forward to substantiate leads which he had previously furnished the government.

In *Dupree* v. *U.S.*, 218 F. 2d 781, citing *Bryan* v. *U.S.*, 5 Cir., 175 F.2d 223, and ruling pronounced in the *Holland* case, *supra*, the court established once more the responsibilities of the prosecution in net worth cases. There as here, all of those responsibilities were not fulfilled by the government and the case was reversed. The court indicated too, the lack of proper instructions on the part of the trial judge: "* * * The charge was not adequate in the circumstances of this trial. * * * (and) was therefore not adjusted to the evidence of the Government's theory of proof. * * *"

Your petitioner as noted in the questions presented, the summary of the case and in this argument, makes the same complaint and maintains that his contentions are borne out by the record herein. (See charge of court to jury, pp. 747 to 783.)

Chaifetz proved, and the agents admitted their failure to run down the leads he had furnished relative to substantial assets owned by him at the starting point of the government's net worth computations but not included thereon by the agents.

Special Agent McIntyre displayed complete ignorance of the meaning of "leads" (R. 390-401) and both agents admitted they had not visited or questioned *any* of the persons named by the defendant, and who had furnished affidavits, to ascertain whether those persons owed the defendant money at the starting point which was repaid during the indictment years. Instead, *without a scintilla of evidence to support their conclusions and assumptions,*

they testified that no loans were outstanding, or if made, were repaid prior to the base year.

In a recent decision handed down by the Second Circuit, reversing the District Court in the now famous Apalachian case, not yet reported, the reviewing court described the government's efforts to convict the defendants as a "bootstrap operation" based on "crash methods."

Such a description is appropriate in the Chaifetz case where the agents substituted estimates, approximations, hearsay, personal opinions and assumptions, in place of proof, while attempting to meet the prosecution's burden. (See also *U.S.* v. *Williams*, (CA 3-N.J.), 208 F. 2d 437.

Still, the court below ignored all of the defendant's contentions and proof that the government failed to establish a firm opening net worth, failed to follow up the leads furnished, failed to establish an increase in the net worth for the years in question and permitted the case to go to the jury.

Informed courts hold (cases cited previously) and it has been ruled by *this Court*, in such cases, "that a motion for a judgment of acquittal must be granted." *U.S.* v. *Riganto* (1954-D.C. Va.), 121 F. Supp. 158.

Vlontis v. *U.S.*, 219 F. 2d 782 (CA 5-1955).
U.S. v. *Donovan*, D.C. Va. 1956, 142 F. Supp. 703
U.S. v. *Bally*, D.C. Conn. 1956, 143 F. Supp. 283.
U.S. v. *O'Connor*, CA 2-1956, 237 F. 2d 466.
Dupree v. *U.S.*, CCA 5-1955, 218 F. 2d 781.
U.S. v. *O'Malley*, D.C. Pa. 1955, 131 F. Supp. 409.

Your petitioner submits that for the reasons stated sending his case to the jury under the circumstances shown was error requiring reversal and that even for no reason other than this ground, the petition for the writ of certiorari ought to be granted, especially since the decision and affirmance by the reviewing court below is in conflict with the decisions of the courts in the third, fifth, seventh circuits *and* the Supreme Court.

II. Permitting a Switch From a Net Worth To a Specific Item Basis, the Use of Incorrect Charts, Assumptions and Hearsay Conclusions of the Agents, Combined to Deprive Defendant of a Fair Trial Resulting in His Conviction for the Middle Year (1953) on a Specific Item Basis, and Was Plain Error Under Rule 52 (b), F.R. Cr. P.

Instead of the prosecutor using the ORIGINAL government net worth chart, as furnished to Chaifetz after his arraignment (D.Ex.No.41-R.845-847), the prosecutor offered in evidence a new chart (Govt. Ex. No. 66 R. 881-884), containing several changes and corrections, made without notification to the defendant prior to trial.

Although taken by surprise, the defendant was able to explain the discrepancies and pointed out the errors, omissions and inaccuracies.[1]

Later, during the trial, the trial judge, over objection, again permitted the government to change its net worth chart, by correcting the amount of Series E Bonds, and by adding an "overlooked" asset. Although the prosecutor stated he was not including living expenses to determine the reconstructed net worth, he also made sure that Govt. Ex. 66 carried the legend, next to the heading of "additional net income" NOT INCLUDING PERSONAL LIVING EXPENSES, all in capitals so the jury could see it when they took it to the jury room.

When asked whether he had included ALL of the defendant's assets at the time he prepared the opening net worth chart, Agent Hein replied: "All that we were able to find" (R. 320).

[1] Idlewild first trust was pledged for a collateral loan as testified by government witness Bonze. Agents listed the asset but omitted the liability. Packard stock was carried as an asset for all years on government's original chart, but carried only at starting point on new chart. Second trust of Alice Lee Hart on 5072 Just Street was not on government's original chart but was added to new chart. Series E bonds were carried at a lower figure on Government's original chart but corrected to correspond with defendant's figure.

"This is not an affirmative answer to the question asked; it shows uncertainty rather than positiveness, and warrants reversal!" *Bryan* v. *U. S.*, 175 F. 2d 223; affirmed, 338 U.S. 552, 70 S. Ct. 317, 94 L. ed. 335.

Admitting in evidence Govt.'s Exh. No. 66, an erroneous net worth chart, and permitting it to be taken into the jury room, as a summary of the evidence, was plain and prejudicial error requiring reversal, since it did not correctly summarize the evidence but contained omissions, interpretations and discrepancies between the record and the chart or exhibit, evaluated the evidence, passed on the credibility of witnesses and weight of evidence, and contained the assumptions and conclusions of the Revenue Agents rather than a summary of the evidence.

The admission in evidence of such erroneous charts has been held to be prejudicial error requiring reversal of the conviction, and such practice has been condemned.

Steele v. *U.S.*, (CCA-5, 1955) 222 F. 2d 628.
Altruda v. *U.S.* (CCA-2, 1955) 224 F. 2d 935.
U.S. v. *Ward* (CCA-3,) 169 F. 2d 460.
Elder v. *U.S.* (CCA-5), 213 F. 2d 876.

In *Steele* v. *U.S.*, *supra*, the Court said:

> "Sending such exhibits into the jury room, allowed the jury to consider this act of the court as investing the exhibits with an air of credibility, as demonstrative evidence over and above, and independent of, the evidence which they purported to summarize and embody, with the undoubted effect of completely erasing from the minds of the jury any therapeutic effect of the charge to the jury that 'the exhibits were not original evidence and were not binding on the jury' was intended or calculated to have."

By permitting this plain error to go unnoticed, in effect approving the practice, the Court below is in conflict with the practice and decisions of the Second, Third and Fifth Circuits.

III. Unreasonable and Arbitrary Restriction of the Number of Character Witnesses Callable by Defendant in a Case Based on Circumstantial Evidence, Was Prejudicial Error.

In his opening statement, former defense counsel stated that defendant would produce reputable character witness including the Hon. F. Dickinson Letts and other judges, to testify to his good character. (R. 73). In a case based on circumstantial evidence, such as this, the importance of character testimony cannot be over-emphasized; it alone can create a reasonable doubt where otherwise one might not exist. Yet the trial court arbitrarily and unreasonably restricted the number of character witnesses callable by defendant to FOUR, over objection of defendant. (R. 668). Defendant proffered character testimony of Judge Letts and other character witnesses who were then present in court, but even the proffer was compelled to be made at the Bench, (R. 668) so that the jury was not apprised that the limited number of character witnesses was due to the restriction by the Court. Although requested to tell the jury that this restriction was by the court, the judge refused to inform the jury that there were many other character witnesses including District Judge Letts, who were ready, willing and able to testify to the good character of defendant but for the restriction by the trial court. (R. 668-670). As a result of this arbitrary restriction, the jury was permitted to infer that the defendant was unable to produce more than four character witnesses. By this arbitrary restriction, defendant was precluded from establishing his "good character" by a reasonable number of witnesses, and was further deprived of the opportunity to create a "reasonable doubt." We believe that this conduct by the trial judge not only violated the concept of fair play but contributed to the denial of a fair trial. This error alone is sufficient to justify reversal of the conviction.

IV. In An Income Tax Evasion Case, Denial of Motion to Strike Government Employees From the Jury Panel Coupled With Systematic Exclusion of Jews and Inclusion of Government Employees, Deprived Defendant of a Fair Trial By An Impartial Jury.

Due process as well as the Sixth Amendment require a fair trial by an impartial jury. All federal government employees who receive their compensation from the United States have a direct interest in the issues involved in a tax evasion case:—the collection of income taxes.

The panel of prospective jurors contained 311 names, 194 of whom were active government employees, 15 more were retired government employees, and others such as housewives and retired, whose present or past affiliations with the government, through marriage, employment or otherwise, were unknown. (80% of the total revenues collected by the U. S. Government consists of INCOME TAXES, excise taxes accounting for 12% and the remaining 8% made up by miscellaneous receipts. (Vol. 46 ABA Journal 1311, Dec. 1960).

Ex Parte Milligan, 71 U.S. 2, 4 Wall. 2, 18 L.ed. 281, holds:

> "A jury with 12 people on it may not always comply with the constitutional provision for a trial by an IMPARTIAL jury. From time immemorial, there was no subject upon which all Americans were more perfectly unanimous than they were in their determination to maintain this great right unimpaired."

At common law, a government employee could not sit on a jury in a criminal proceeding in which his employer was a party. Before the enactment of the statute which enabled government employees to sit on juries in the District of Columbia, a government employee was held disqualified from sitting on a jury in a prosecution for conspiracy to *defraud* the United States, because BIAS WAS IMPLIED BY LAW. *Crawford* v. *U.S.*, 212 U.S. 183, 20 S.Ct. 260, 53 L. ed. 465, *reversing* 30 App.D.C. 1.

In Crawford, a druggist whose store was designated as a postal sub-station and who was paid a fee therefor, was held to be disqualified because of his connection with the government

The Act of Aug. 22, 1935 (49 Stat. 682, ch. 605), amending D. C. Code Title 11, Section 1429, does NOT provide that government employees may sit in criminal trials where the government is a party. It merely states that they shall be *qualified* as jurors and not exempt from jury duty. Unquestionably, they may sit on all civil cases between private parties and in criminal cases where their employment is not connected with the type of case on trial. But in the present case, the collection of revenue from which they are paid being directly involved, they should be disqualified and peremptorily excused for BIAS IMPLIED BY LAW, in a tax fraud criminal case.

Where, as here, defendant has exhausted his peremptory challenges, and ten out of the twelve jurors were government employees, defendant was deprived of his constitutional right to a trial by an IMPARTIAL jury.

Although several cases decided by this Court have been concerned with the propriety of government employees sitting on criminal juries, the question was never presented in a tax evasion case where the jurors were paid from the revenues from which the Government had been allegedly defrauded.

In *Burgman* v. *U.S.* (88 App. D.C. 184, 188 F. 2d 637), the charge was treason; in *U.S.* v. *Wood* (229 U.S. 123, 57 S.Ct. 177, 81 L.ed. 78, rev. 60 App. D.C. 330), the charge was petty larceny; in *Frazier* v. *U.S.* (335 U.S. 497, 69 S.Ct. 201, 93 L.ed. 187) the charge involved a violation of the narcotic laws; and in *Dennis* v. *U.S.* (339 U.S. 162, 70 S.Ct. 519, 94 L.ed. 734) the charge was contempt for failure to obey a Congressional subpoena. None of these cases involved the revenues nor were the jurors directly affected because of

being compensated from revenues involved in the alleged attempt to evade income taxes.

In *Daniels* v. *Allen*, 344 U.S. 443, 73 S.Ct. 437, 97 L.ed. 469, this Court held that it is the responsibility of the Federal Supreme Court, under the Constitution, to redress "jury packing" * * * "a sinister art."

In the *Frazier* case, *supra*, the Supreme Court said:

> "In each case, a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on score of IMPARTIALITY, even though the basis may arise through the framework of chance or other unlawful factors wholly within the framework of proper procedures for selecting the panel and choosing the jury from it."

Systematic *EXCLUSION* of Negroes, women, and others has been condemned by this Court as a denial of the right to an impartial jury.

Hernandez v. *Texas*, 74 S.Ct. 667, 347 U.S. 475, 98 L. ed. 866.

Avery v. *Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.ed. 1244.

Patten v. *Miss.*, 332 U.S. 463, 68 S.Ct. 184, 92 L.ed. 76.

In *Oyama* v. *State of California*, 332 U.S. 633, 68 S.Ct. 269, at 270 et seq., the Supreme Court, in holding that a defendant's constitutional rights were denied in this manner, stated:

> "In approaching cases * * * in which federal constitutional rights are asserted, * * * there remains the question of whether discrimination on the basis of racial descent, as revealed in this case, is justifiable. * * * Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. * * * The rights of a citizen must not be subordinated merely because of his father's country of origin. This denies the defendant the equal protection

of the laws and that failure to grant defendant's plea * * * takes property * * * without due process of law."

Systematic *INCLUSION* of government employees in order to *pack* the jury in favor of the prosecution, is equally odious and equally prejudicial to a taxpayer in a tax evasion prosecution.

The Chaifetz case clearly discloses a calculated and systematic INCLUSION of government employees and a systematic EXCLUSION of all jurors of the Jewish faith, and even those whose names sounded Jewish, by the peremptory challenging tactic of the prosecution, and the creation of fertile soil for the injection of the religious issue by the prosecutor when he asked the defendant's brother, subpoenaed as a government witness, if he and defendant's mother spoke in YIDDISH in the presence of the revenue agents—for the sole purpose of creating anti-Semitic feeling and prejudice against the defendant. THIS ERROR CALLS FOR REVERSAL.

V. Failure To Give Any Instruction For the First Three Years, of a Five Year Indictment, On the "Lesser Included" Offense, Precluding Acquittal If Only a "Lesser-Included" Offense Had Been Committed, Was Prejudicial Error.

Rule 31(c), Federal Rules of Criminal Procedure provides that a defendant may be found guilty of an offense necessarily included in the offense charged. Although the trial judge agreed with defendant's contention that the lesser offense of WILLFULLY failing to supply information required by law, contained in *26 U.S.C.A. sect. 145(a)*, under the 1939 Code and *26 U.S.C.A. Sect. 7203* under the 1954 Code, was necessarily included in the felony charged and was justified by the evidence, he gave a "lesser-offense" charge for 1954 and 1955, but refused to give such a charge for 1951, 1952, and 1953, (R. 784-785) because the "lesser offense", a misdemeanor, was barred by limitations for those years.

The Court of Appeals, in the instant case, devoted all but the last paragraph of its seven page decision to a discussion of the "lesser offense" instruction, and completely ignored all other assignments of error and other plain errors existing on the face of the record, holding that because defendant could not be convicted of the lesser included offense, he was not entitled to a charge thereon. It did not reach, or chose to ignore, the question whether the lesser offense was included in the felony charged, or whether the jury should have been instructed to acquit, if Chaifetz had committed the lesser offense in 1951, 1952 and *1953.*

By this decision, the court below repudiated the Supreme Court's ruling in the case of *Spies* v. *U.S.*, 317 U.S. 492, 87 L.ed. 418, 63 S.Ct. 364, reversing 128 F.2d 743. Mr. Justice Jackson, speaking for the Court, said:

> "We think it is clear that this felony MAY include one or several of the other offenses against the revenue laws."

In an enlightening opinion, District Judge Anderson, in *U.S.* v. *McCue*, 160 F.Supp. 595 (D.C. Conn. 1958), analyzed the offense of "willful failure to supply information" (Section 145a) leaving no room for doubt that it is necessarily included in the felony of attempting to evade tax by filing a false and fraudulent return.—"The test to be employed is whether it is possible to commit the greater offense without first having committed the lesser offense. (See *James* v. *U.S.*, 238 F.2nd. 681)."

That the lesser included offense was barred by limitations for 1951, 1952 and 1953, should not have affected the rights of defendant who was ENTITLED to such a charge. Were it not for limitations, the trial judge would have given the charge for all five years. By not giving this instruction for the first three years, the jury was precluded from finding that defendant had committed the lesser included offense in 1953, and based on that finding, to ACQUIT.

They were led to believe that the lesser offense was in no way involved for the earlier years. It was for the jury to determine what offense, if any, had been committed in 1953; felony, misdemeanor or none. They were compelled to choose between felony or acquittal. The failure to instruct on this crucial issue was fundamental error entitling defendant to reversal of the conviction.

VI. It Was Error To Submit to the Jury For Its Determination a Question of Law Concerning Gift Tax Regulations for 1953 and 1954.

Several months prior to his death on December 30, 1953, Louis Chaifetz, father of defendant, turned over $9600 to the defendant to pay for his funeral, tombstone and to support Ida Chaifetz, the widow of deceased and mother of defendant. This transfer of funds was established by the testimony of members of his family who had personal knowledge of the transaction through conversations with the deceased prior to his death, and who had heard the dying declarations of Louis Chaifetz. (R. 432-433, 437-438, 470, 472).

Agent Hein admitted that defendant had told him and Special Agent McIntyre about this in September 1956, three years before the trial, (R. 354-356), but the prosecutor attempted to negate and becloud the issue by testimony that no gift tax return had been filed.

Defendant contended then, and contends now, that no gift tax return was required because the transaction was NOT A GIFT. Under the *Revenue Act of 1950*, approved September 23, 1950, (*I.R.C. Sec. 811 (c) and (d)*) transfers within three years prior to death were presumed to have been made in contemplation of death and were includible in the estate tax return of the decedent. Section 111 of the Act provided that no estate tax return had to be filed unless the estate exceeded $60,000 at date of death.

In any event, no gift tax return was required, since the transfer was about six months prior to the death of Louis Chaifetz, the transferor.

It is to be noted that defendant did not have to prove receipt of this non-taxable item from his father, since he had already proved that he had more additional assets at the starting point of the net worth computation period to explain an alleged increase in net worth *through 1953*, the only year for which defendant was found guilty of tax evasion.

We say that by creating this false issue and the erroneous instructions given thereon as shown elsewhere herein, and the improper implications and innuendos indulged in by the prosecutor, that defendant was denied a fair trial and was denied "due process" and for this reason too, the conviction should be reversed.

VII. Plain Error Was Committed When the Trial Judge Failed To Give Fundamental Instructions and Gave Erroneous Instructions on Vital Issues in the Case.

In *SCREWS* v. *U.S.*, 325 U.S. 91, Mr. Justice Douglas wrote:

> "In a criminal case, it is always the duty of the court to instruct on all essential questions of the law, whether requested or not."

But in the instant case, expressly denominated as a NET WORTH case, and tried as such, the trial court gave a two and one-half hour charge which was so disjointed, unbalanced and slanted in favor of the prosecution, that an acquittal for the year 1953 would have been miraculous.

Again and again, the jury was instructed how to find the defendant guilty, but only in rare instances were they told how to find him NOT guilty. (The entire charge is found herein Record pages 747-782.)

The instruction * * * "the jury should not give more weight to the testimony of the Revenue Agents merely because of their employment", was nullified, with prejudicial effect, when the instruction, as given, told the jury:

> "You must not give any special weight to the testimony of the Bureau of Internal Revenue employees merely because they are employees of the Government, CHARGED WITH CERTAIN RESPONSIBILITIES UNDER THE TAX LAWS," (R. 751).

The additional description of the agents' duties unduly and unfairly emphasized their credibility against that of any defense witness and in effect told the jury that the agents were only doing their duty.

In its instruction on the effect of character testimony, the trial court nullified that instruction by inserting a double negative or redundancy, thusly:

> "The evidence of good character, when taken or weighed with all the other evidence in the case, may OR MAY NOT be sufficient to raise a reasonable doubt WHERE ONE OTHERWISE MIGHT NOT EXIST", (R. 752).

For the instruction to be fair and impartial, one of the phrases, "or may not be", or, "where one otherwise might not exist", should have been omitted. As stated, the character evidence was either insufficient or the jury was led to believe that a reasonable doubt might not exist—Two AGAINST the defendant, and only one, in favor.

The trial court instructed the jury that their verdict depended on the following ultimate questions of fact: (R. 756 et seq.):

> "First, was there a greater tax due from the defendant for the year in question than was shown on the defendant's tax return for that year?
>
> "Second, did the defendant know that there was a greater tax due than was shown on the income tax return in question?

> "Third, did the defendant willfully attempt to evade the tax known by him to be due by filing * * * a false income tax return?"

But nowhere did the trial court explain how net worth ties in with these questions before they can be answered!

The trial judge FAILED to tell the jury that "there is no evidence in the case indicating a greater tax due than shown on the defendant's returns, except from the assumptions and conclusions of the Revenue Agents that there was an increase in net worth in each year, and that the computation indicating an additional tax due was based on those assumptions and conclusions.

The trial court, failed to explain to the jury that there was no evidence in the case that defendant *knew* that there was a greater tax due, and that they would have to make such an inference based on the inference or assumption, first, that there was a greater tax due, which would have to be based on a prior inference that there was an INCREASE in net worth for the year in question.

The trial court failed to explain that there was no evidence that the defendant willfully attempted to evade the tax known by him to be due, by filing a false return, because such a determination would have to be inferred from "all the prior inferences precedent"—if we may use that expression.

By this type of instruction, omitting all inferences favorable to the defendant, the jury was permitted to infer that they could find the defendant guilty as charged, basing their verdict on specific items of omission, since they could infer that if any specific items had been omitted, an additional tax was due thereon.

One need but examine the language of the prosecutor's closing argument, hammering away at the specific items for 1953, (R. 741-742) to conclude that there is no other logical

explanation for the conviction under Section 145(b) for 1953, since the jury acquitted the defendant of tax evasion for the years 1951, 1952, 1954 and 1955, thereby repudiating the government's net worth computations completely and accepting defendant's evidence and testimony concerning his assets existing at the start of the prosecution period.

The trial court's acquiescence in going along with the prosecutor's efforts to convict the defendant for 1953 via the "specific item" method is further demonstrated by an excerpt from the court's charge:

> "• • • the government does not have to prove evasion of the entire amount of tax liability charged, but it is sufficient to prove that the defendant attempted to evade a substantial amount of his tax liability for the particular year in question. • • • it is sufficient if SUCH ITEMS be proved to have existed in substantial amounts." (R. 757-758).

(The year 1953 had more specific items than any other year; more than the other four years combined.)

Your petitioner contends that such an instruction invited a conviction based on the specific items omitted in 1953, even though it was proved that there was no concealment of such items; that they were for the most part deposited and identified in defendant's check stub deposit records, since, if items were omitted, obviously an additional tax was due thereon, regardless of the net worth computation.

The jury was told again, and instead, that "if they found that defendant's tax returns for the years involved did not *fully* and *correctly* report defendant's income, and the tax due thereon, and that the returns were filed in a willful and intentional attempt to evade and defeat payment of the income tax, CONVICTION WOULD BE WARRANTED" (R. 758, 759).

This was an erroneous and prejudicial charge and not proper where the prosecution has attempted to reconstruct

the taxpayer's income under the 'net worth' method. Here, not only had the prosecution stipulated that this was a net worth case and that it would not attempt to prove conviction on a specific item basis, but the court had ruled that the prosecution was precluded from obtaining a conviction on a specific item basis. (R.293, 296-7, 303). Both the prosecutor and Agent Hein knew that specific items omitted from income do not enter into the computation in a net worth case. (R.294, 302); that the reconstruction of income and the tax due thereon is computed on the basis of the alleged increase in net worth in any one year.

Of prime concern to both parties was the vital issue whether there was a net worth increase for ANY year involved. The jury was *never* told to determine that question, and without that determination, the Government's case necessarily had to fail.

In instructing the jury on the "net worth theory", the trial court failed to tell them that the PRIMARY question in the instant case was the *starting net worth*, and whether or not there was an *unaccounted* increase in net worth for any year involved which could conceivably be additional income on which tax was due, and that all other questions hinged on these basis propositions which had to be determined first; for, if there was no net worth increase proved beyond a reasonable doubt for the first year, or any year, it would not be necessary for the jury to go any further, since the case should be ended due to the failure of the prosecution to prove a net worth case.

IT IS INCREDIBLE, BUT TRUE, THAT NOWHERE WAS THE JURY TOLD THAT IF THE GOVERNMENT FAILED TO PROVE A NET WORTH CASE BEYOND A REASONABLE DOUBT THAT IT WAS THEIR DUTY TO ACQUIT, and not to decide other questions of fact.

THIS WAS FATAL ERROR, because although the trial court explained the nature of the net worth method, the

assumptions on which it rests, IT OMITTED the inferences available to the accused in such a case. In the *Holland case*, supra, this Court stated:

> "Trial courts should approach net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the defendant to refute; *charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused.* • • •
>
> "*Appellate courts should review net worth cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.*"

The Court of Appeals not only ignored the plain error committed by the trial court, but also ignored the net worth aspect of this case although charged by the Supreme Court with the duty to review net worth cases carefully because of the circumstantial nature of the evidence where inferences are based on inferences.

Defendant was further prejudiced by the incorrect instruction given on the gift tax laws as shown hereinabove in connection with the funds left by his father in 1953.*

This "gift tax" instruction was incorrect because the Estate Tax Regulations (Int. Rev. Code—Sec. 811, (c) and (d)) and the Gift Tax Regulations 26 U.S.C.A. Sec. 1000 et seq (1939 I.R.C.) provide that transfers by decedents dy-

* Record 768: "The Court informs you that in 1953 and 1954 the law required that when a gift in excess of $3,000 was made in trust, notice thereof should be filed with the Internal Revenue authorities by either the beneficiary or the trustee • • • Defendant denies that this money comes within the trust provisions of the regulations of Internal Revenue, and it is *for you to determine from the evidence in this case what the actual situation is.*"

ing after September 23, 1950, are, unless shown to the contrary, deemed to have been made in contemplation of death if they were made within 3 years prior to death and are INCLUDIBLE in the gross estate. Yet the trial court permitted the prosecutor to attempt to negate receipt of the money left by defendant's father by creating an issue as to propriety of filing a gift tax return, instead of telling the jury that the only issue in this connection was whether defendant did, in fact, receive this money.

Defendant was also prejudiced by the improper admission of information concerning his tax returns for prior years (1945-1950) and the instructions given thereon. (R. 761).* This instruction implied that defendant was guilty of tax evasion in prior years too. Instead of telling the jury to acquit the defendant if the government FAILED to prove a net worth case, this instruction was given: (R. 772):

> "If you find that any one or more of these requirements has not been established beyond a reasonable doubt with respect to any year in question, then you must find that the government's net worth contentions *have not been sustained* as to any such year or years". Nowhere is the jury instructed that in such event, they must acquit. This is PLAIN ERROR and petitioner prays that this Court deem it of sufficient importance to reverse the judgment below.

In *Bollenbach* v. *U.S.*, *326 U.S. 607*, at 612, a conviction was reversed because of an erroneous instruction, the Supreme Court holding that "discharge of the jury's responsibility for drawing appropriate conclusions from the testi

*"The government has introduced into evidence income tax returns * * * for years preceding 1951 and other evidence which purports to show understatement of income in the years preceding 1951. This evidence is to be considered by you on the issue of wilfulness during 1951 through 1955 only, as the defendant does not stand indicted for any year other than 1951 through 1955."

mony depended on the discharge of the judge's responsibility to give the jury *the required guidance by a lucid* statement of the relevant legal criteria".

This is equally true where the trial judge fails to give the jury the required guidance, BY A FAILURE TO INSTRUCT, and constitutes "plain error" which this Court may notice under Rule 52(b), F.R.Cr.P.

The Court of Appeals for the District of Columbia has recognized and applied this rule in other cases, as recently as January 12, 1961.

Steward v. *U.S.*, 101 App. D.C. 51; 247 F.2d 42.
Tatum v. *U.S.*, 88 App. D.C. 386; 109 F.2d 612.
Williams v. *U.S.*, 76 App. D.C. 299; 131 F.2d 21.
Barry v. *U.S.*, No. 15765, U.S. App. D.C. Dec 1-12-61 (not yet reported).

In the *Barry case*, Judge Fahy said:

> "But the responsibility of instructing the jury upon the essential elements of a crime rests upon the court. Failure to meet this special responsibility of the court itself need not be overlooked by an appellate court because overlooked by counsel. • • •
> *U.S.* v. *Atkinson*, 297 U.S. 157, 160.
> *Elgutt* v. *U.S.*, 197 U.S. 207, 221-222.
> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

The Supreme Court will also notice "*plain error*" to correct manifest injustice. *Fisher* v. *U.S.*, 328 U.S. 463; 66 S.Ct. 1310, 90 L.ed. 1382.

To repeat, when the trial court refused to instruct the jury on the crucial issue of the lesser included offense for the year 1953, it was a clear violation of defendant's fundamental right to a fair trial. This error, with the others noted above, is presented for the Court's attention and correction in the interests of justice.

VIII. Defendant Was Denied "Due Process" When the Trial Judge Gave a Secret and Erroneous Instruction to the Jury in the Absence of the Defendant, Without His Knowledge, Consent or Waiver, in Violation of Rule 43, F.R.Cr. P.

Rule 43, F.R.Cr.P., requires the presence of the defendant at every stage of the trial. The trial court violated this rule and by doing so denied the defendant "due process" in violation of the Fifth Amendment. This error is of such serious nature as to require reversal. During its deliberations the jury sent out a note to the trial judge requesting a certain exhibit (Def's No. 60 for identification—"the Philadelphia Conference Letter"). Without reopening the Court or sending for defendant, and without his knowledge or consent, the Trial Court violated Rule 43 and the fundamental rights of defendant by sending in a secret misleading and untrue answer to the request. Instead of advising the jury, in the presence of defendant and counsel, that the requested exhibit was not available to them because it was not in evidence but only marked for identification, the trial judge replied:

> "November 24, 1959. Received message 1:30 P.M.: after consulation with counsel, jury was informed that *no such exhibit EXISTED.*
>
> /s/ Luther W. Youngdahl"

This was prejudicial and not true! THE EXHIBIT DID EXIST!

Defendant was not informed of such request or given an opportunity to avail himself of any corrective remedy, such as a motion to re-open the case for purpose of admitting this exhibit.

Former defense counsel advised defendant that he did not recall being consulted about this note from the jury.

In *McClanahan* v. *U.S.* (CCA-5-1959) 272 F.2d 663, that Court of Appeals reversed a conviction of tax evasion on this ground alone, without reaching other errors as-

signed. This result is in line with other decisions of the Supreme Court which has criticized such procedure and reversed even in civil cases. In criminal cases, the rules are applied even more strictly.

Shields v. *U.S.*, 273 U.S. 583; 47 S.Ct. 478.
Fillippon v. *Albion Vein Slate Co.*, 250 U.S. 76.

The Court of Appeals below created a conflict with the Fifth Circuit when it ignored this error and passively approved the conduct of the trial judge in this respect.

The Supreme Court should settle this matter, not only because of the conflict between the circuits, but also because the decision flies in the face of previous decisions of this Court which are binding on all lower Federal Courts.

In *Hopt* v. *Utah*, *110 U.S. 574*, this Court held, "nothing shall be done after indictment in the absence of the prisoner".

In *Lewis* v. *U.S.*, *146 U.S. 370*, this rule was re-affirmed by the Court's statement that "* * * it is not within the power of either the prisoner or his counsel, to waive the right to be personally present during the trial of a felony". (See also *Diaz* v. *U.S.*, 223 U.S. 442).

In *Synder* v. *Comm. of Mass.* U.S. ; 54 S.Ct. 330, at 341, Mr. Justice Roberts, in his dissent, stated:

> "Our tradition, the Bill of Rights of our federal and and state constitutions, state legislation and the decisions of the Courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is the very essence of due process. * * * Speaking generally of the administration of criminal justice throughout the nation, this Court has said—'a leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the prisoner'—citing *Hopt* v. *U.S.*, *Lewis* v. *U.S.*, and *Diaz* v. *U.S.*, 223 U.S. 442, 32 S.Ct. 250. * * * The cases cited

> in the margin while by no means exhausting the authorities, sufficiently illustrate and amply sustain the proposition that the right is FUNDAMENTAL and assures him who stands in jeopardy that he may in person, see, hear, and know all that is placed before the tribunal having power by its findings to deprive him of his liberty or life. * * * As the cases show, the right of presence exists at every step of the trial, whether it be during the giving of oral testimony, the submission of a document, the presentation of physical exhibits, the argument of counsel, the charge of the court, or the rendition of the verdict".

Such a violation of a basic Constitutional Right ought not to be condoned by the Supreme Court and the erroneous conviction herein should be reversed.

IX. Misconduct of Deputy Marshal in Making Improper Remarks to the Jury and the Failure of the Trial Judge to Investigate the Charges to Determine Whether Defendant Was Prejudiced, Was Reversible Error.

Grievous error requiring reversal was committed by the Trial Court when it ignored the charges of misconduct lodged against the deputy marshal attached to the trial judge's court, at the hearing on the motion for judgment of acquittal, or, in the alternative, for a new trial. (R. 811 et seq.) These charges were brought to light after the verdict, when an alternate juror contacted former defense counsel and reported several prejudicial remarks made by the deputy marshal to the jurors during the trial.

The trial judge chose to ignore the accusations and evaded his plain duty to initiate an investigation to determine the truth of the charges and the existence of prejudice to the defendant.

Defendant was unaware of the details of the proceedings had at the Bench when the misconduct was first reported (R. 811 et seq.) because the reporter resigned soon thereafter and had gone to Texas and it was only after March

16, 1960, when defendant received the transcript of the proceedings of December 16, 1959, that he first discovered what had been said and done to deprive him of his right to a fair trial by an impartial jury.

Only the day before this was reported to Judge Youngdahl, he held that a failure to report to the Court that a juror knew a witness, was a contempt of court. *U.S. v. Henson*, D.C.D.C., 179 F.Supp. 474. His opinion in that case showed his concern for "an atmosphere of unbiased and scrupulous honesty" in the jury system and that a constant vigilance "must be maintained over the source and nature of *all information imparted to our jurors*".

In the main case in which the Henson contempt occurred, *U.S. v. Brown*, 179 F.Supp. 478, wherein the defendant was convicted of robbery, Judge Youngdahl, sui sponte, granted a new trial, although the court stated that it was unable to determine whether the defendant had been prejudiced by the familiarity between a juror and a witness.

Yet one day later, when a more serious disregard of the jury's sanctity is reported to the same judge, the situation is IGNORED.

If for no other reason than this occurrence, prejudicial error was committed for which this Court should reverse the conviction.

In *Remmer* v. *U.S.*, 347 U.S. 227, 74 S.Ct. 450, 98 L.ed. 654, this Court held that in a criminal case, ANY private communication, contact, tampering, directly or indirectly, with a juror during trial about the matter then pending, is presumptively prejudicial, and that once this is reported, the burden rests heavily on the Government to establish, after notice to and hearing of defendant, that such contact was not prejudicial.

When the misconduct of the deputy marshal was reported to the trial judge, a duty was imposed upon him to initiate such an investigation.

But, the trial judge chose to ignore this matter, denied all of the motions and sentenced defendant to imprisonment for 4 to 12 months and to pay a fine of $10,000 on count 3; and to 4 months and to pay a fine of $10,000 on count 4, with the fine suspended, and the jail term to run concurrently with that imposed on count 3.

The Court of Appeals, by remaining silent on this assigned error, condoned this procedure and ignored the decision of the Supreme Court in the process.

X. Permitting Revenue Agent to Testify As To Defendant's Returns As To Pre-Indictment Years, Instructing Thereon and Intimating That Defendant Was Guilty of Tax Evasion In Prior Years For Which He Was Not Charged, Was Error.

Revenue Agent Hein, the discredited "expert" witness for the prosecution, over defendant's objection, was permitted to testify from incomplete records and tax returns as to the returns filed and taxes paid by the defendant for the years 1945 through 1950, pre-indictment years. Without a scintilla of evidence to prove that those returns were either incorrect or that defendant had been guilty of any violation of the Revenue laws for those years, Hein was given free rein to comment and surmise as to the correctness of the returns, implying that defendant was guilty of tax evasion for those years as well (R. 698, 702, 727, 744).

In *Greenberg* v. *U.S.*, 280 F.2d 472, 1st Cir. 1960, a tax conviction was reversed because the agent's testimony there, as here, was strictly hearsay.

In *Paris* v. *U.S.*, 26 F. 529, 531, the court there stated: * * * "such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial".

In *Hargett* v. *U.S.*, 183 F.2d 859, at 863, citing *Boyd* v. *U.S.*, 142 U.S. 450, the court ruled: "However depraved in character and however full of crime their past lives have been, the defendants *were entitled to be tried upon competent evidence and only for the offense charged.*"

It is submitted that this ground alone warrants reversal.

XI. Prejudicial Tactics of the Prosecutor in Putting Words Into the Mouths of Witnesses, Making Unwarranted Remarks and Arguments, and Committing Other Acts Calculated to Inflame and Prejudice the Jury, Was Reversible Error.

In his opening statement, the prosecutor informed the court and jury that this was a net worth case; that the defendant kept a "double set of books; that his records were false and deceptive, and that his living expenses would NOT be included in the government's net worth computation (R. 66-68).

Although the government's net worth chart (G. Ex. No. 66) did not include living expense, as such, the prosecutor MADE SURE TO PRINT ON HIS EXHIBIT "NOT INCLUDING LIVING EXPENSES" and then had Agent Hein testify that "living expenses of about $5,000 per year were not included". (R. 205-6). This was repeated several times by Hein, to make sure that the jury got the point.

Petitioner reiterates that he was denied a fair trial and 'due process' by the prosecutor's "grand stand play" of the evidence he had amassed and intended to use in the trial of the case, magnifying the importance and the volume of the records, by rolling them into the courtroom, each day of the 6 weeks' trial, using a supermarket type of grocery cart as his file, and allowing the discredited Agent Hein to repeatedly point to the cart when he was unable to find an answer to a question. This, combined with the effect of parading before the jurors, eighty-seven purported witnesses, forty-four of whom were never called since their

testimony or records were stipulated before the trial started, together with the prosecutor testifying from the floor though not sworn as a witness, and putting words into mouths of witnesses; the planned striking of all Jews from the jury and then asking about a conversation in Yiddish between defendant's mother and brother, was deliberate and done only for the purpose of inflaming and prejudicing the jury against the defendant. Such prejudicial and improper conduct of a prosecutor, condoned by the trial and appellate courts, should not go unrebuked by the Supreme court.

In *Berger* v. *U.S.*, 295 U.S. 78, 55 S.Ct. 629, 79 L.ed. 1314, reversing 73 F.2d 278, this Court held that a prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to REFRAIN from improper methods calculated to produce a wrongful conviction. In that case, as here, the prosecutor's mis-statements of fact, in cross-examination, unsubstantiated intimations, pretense that the witness had said something he had not said, and persistent cross examination on that basis, bullying of witnesses and intemperate and misleading argument to the jury, were held so prejudicial as to require reversal of the conviction.*

XII. Trial Court Erred In Failing To Suppress Testimony of the Agents and Books and Records Fraudulently Obtained From Defendant in Violation of His Constitutional Rights and By An Illegal Search of Defendant's Office During His Absence.

At the trial, defendant testified that he had given his records to the revenue agents based on their express representations that the investigation was "only a routine audit", civil in nature, to determine whether he owed any

* Examination of Bomze (R. 95-103, 107), Chaifetz's brother re conversation with mother (R. 473-475), Chaifetz's sister (R. 433-436), Mrs. Johnson re loan to buy drug store (R. 581-583) and then on the 1953 income tax return (R. 675-676). Query: How could Louis Chaifetz, who died Dec. 30, 1953, sign and file a return *for* 1953 *in* 1954?

additional tax; that he was led to believe this by being requested to sign several waivers of the Statute of Limitations by being told that if this were a criminal fraud case, such waivers would not be necessary; and that the government could not collect any tax if he didn't sign, etc. (R. 500, 501).

Believing in the integrity of federal government agents, and the representations made, defendant freely turned over his fee books, check book stubs and other records, from which Agents Hein and McIntyre were able to obtain the names of every one of the clients and others with whom he had business dealing, and from which all of the information on the so-called specific items were obtained, since a mere comparison of the fee book and the bank deposit entries on the check stubs showed that several items had been omitted from the fee book. (This on its face showed no attempt at concealing income, since the fees were deposited and identified in the check stub entries).

Upon cross examination of the two agents, they contradicted each other as to what was found in the records they examined. (R. 36 and 51). Hein testified that he and McIntyre looked at papers in a box in defendant's office, during his absence * * * and McIntyre testified that "the defendant's then junior clerk presented some checks which Mr. Chaifetz left for us when he was not there; that they were not in a box he left cancelled checks on a desk for us. * * * we examined it * * * Mr. Chaifetz told us the day before what he would leave for us?". Chaifetz denied giving any permission to search his office during his absence. (R. 49-50).

Query: Would an attorney, under investigation by Internal Revenue, even though he knew he was completely innocent of any wrongdoing, allow Agents to search his office and go through his records, in his absence?

At the trial, Hein (R. 190) contradicted McIntyre again as to the cancelled checks by testifying that he never saw

any checks from Liberty or American Security and Trust Banks. * * *" He did make a box of mixed up papers available to us which were of no use". (The evidence at trial showed that the checks were in a box and never on a desk).

In *Old Colony* v. *Comm. of Int. Rev.*, 357 U.S. 28 at 32, 78 S.Ct. 1033, the Court stated:

> "This case presents an unusual case involving the integrity of a criminal trial in federal courts. * * * acting under the impression that no criminal proceedings were involved, he cooperated and signed waivers, etc. under 26 U.S.C. 275(c), 53 Stat. 85, 1939 I.R.C."

Although Old Colony was a civil case, the same situation prevailed in the instant case, and your petitioner prays that this Court declare that his records were obtained in violation of his constitutional rights, and reverse the conviction.

XIII. The Revenue Agents Were So Biased and Determined To Obtain a Conviction That They Indulged In Assumptions and Conclusions As a Substitute for Proof. This Was Plain Error.

Having recommended criminal prosecution of the defendant, Agents Hein and McIntyre were so biased and so determined to build a case against the defendant, that they indulged in assumptions, without verification which was available to them, gave incorrect and false testimony, and admitted that it was their intention to seek a criminal indictment while the investigation was still going on. Hein already had prepared a "rough net worth" computation, although he had never seen some of the tax returns for the years involved, and without checking with defendant to see whether any assets were omitted at the starting point. When "leads" as to additional assets omitted in Hein's opening net worth was furnished to Hein and McIntyre by the defendants, they ignored such leads, failed to track

them down or investigate them, and omitted substantial additional assets at the base period which would have shown any fair-minded agent that there was no real net worth increase, but merely a change in the form of the assets from 1950 to 1955.

Confucius is reported to have said: "There are none so blind as those who will not see". Agents Hein and McIntyre refused to see or recognize anything favorable to the defendant or detrimental to their criminal prosecution.

Hein's misleading and incorrect pronouncements of the revenue laws and as approved by the court, were highly prejudicial. He was forced to admit that he did not check the "cash flow", did not determine how much cash was deposited by defendant in his bank accounts; did not total or determine how much bonds were bought for cash from funds other than from matured bonds; did not trace the flow of cash from checking transactions where defendant deposited escrow moneys in his account, and disbursed such moneys from cash on hand and other transactions, such as outstanding loans receivable. McIntyre and Hein could have done all this very easily. Although affidavits were furnished to them giving names and addresses of persons indebted to defendant at starting point, the agents never asked one person whether they owed defendant the amount stated at the opening period or checked these leads.

Since the trial court and the appellate court failed to halt this unwarranted criminal case, petitioner is left to the mercy of the Supreme Court under its supervisory powers over the proceedings of federal courts to strike down a conviction secured by such unfair methods. In *Mesarosh v. U.S.*, 352 U.S. 1, 77 S.Ct. 1, 8, cited in *U.S. v. Shotwell Mfg. Co.*, 355 U.S. 233 at 234, 78 S.Ct. 245 at 247, the court said:

> "This is a federal criminal case and this court has supervisory jurisdiction over the proceedings of the federal courts. If it has any authority to perform in this regard, it is to see that the waters of justice are

not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity".

XIV. The Conviction on the 4th Count (for 1954) Can Not Stand Since Defendant Was Not Found Guilty of Any Crime Cognizable in Law.

The verdict returned by the jury on the fourth count (for the year 1954) was in writing, on a form prepared by the court, as follows:

"Guilty of failing to supply information required by law."

This verdict, purportedly a conviction on the lesser included offense, is an indication of how badly the court framed its instructions.

The written verdict, reproduced on page 806 of the Record, indicates that the word "willfully", which is a necessary ingredient of the lesser-offense contained in Section 145(a) under the 1939 Code and Section 7283 of the 1954 Code, was *conspicuously* absent. Upon being polled, each individual juror verbally repeated the written verdict, OMITTING the word "willfully".

Your petitioner contends that the Court of Appeals below has arbitrarily applied a different ruling in the instant case than that which it applied in *Dorsey* v. *U.S.*, 108 U.S. App. D.C. —; 281 F.2d 71, (No. 15709, Dec. 6-30-60) wherein defendant there was convicted of robbery, assault with a dangerous weapon and rape—the rape conviction was reversed, even though the sentence thereon was concurrent with the robbery and assault.

Petitioner takes issue with the Court of Appeals below that defendant is not harmed by refusing to consider the conviction on the 4th court or by its affirmance, on the ground that the sentence is a concurrent one. The Government, in it Brief on Appeal, conceded that the conviction

on this count cannot stand. But this conviction still stands, although both sides agree that it is erroneous.

When petitioner was found guilty of a "crime" which is not contained in the U. S. Code as a violation of law, and sentenced to a prison term of 4 months and a fine of $10,000 —the fact that the fine is suspended and the jail term is to be served concurrently with the sentence on the 3rd count, does not justify a conviction for a crime that does not exist.

A fortiori, where, as in this case, the government concedes that the conviction on this count is erroneous.

In the case of *Mosseau* v. *U.S.*, 266 F. 18, the court decided and ruled that "no conviction can be had for the violation of a statute for which no penalty is provided".

In the present case of *U.S.* v. *Chaifetz*, the error of the trial court and the failure of the Appeals Court to correct the error on count 4 is even more patent. No violation of ANY statute occurred nor was ANY crime committed by Abraham Chaifetz during 1954 for which any punishment could be meted out by the court. Yet, the record stands uncorrected to date and your petitioner respectfully prays that this court take cognizance of this plain error and reverse the conviction on this count.

CONCLUSION

Your petitioner has selected only a number of the glaring errors committed by the trial court, which errors were compounded by the Court of Appeals when it affirmed the judgment of the trial court without so much as considering these important questions, important not only to petitioner but to all taxpayers in the United States.

Although we believe that any one of the foregoing errors is sufficient in itself to warrant reversal, the "CUMULATIVE EFFECT OF ALL THE ERRORS SHOWN NECESSITATES THE REVERSAL OF THE CONVICTION IN THIS CASE." *Gordon* v. *U.S.*, 344 U.S. 414, 97 L.ed. 447.

In a "close case" an error which might otherwise be harmless, will be deemed prejudicial. *Bihn* v. *U.S.*, 328 U.S. 633; 90 L.ed. 1485.

Fundamental principles of liberty and justice have been disregarded in this case. In such a situation, the Supreme Court of the United States has never hesitated to exercise its jurisdiction to enforce the guaranty of constitutional rights and to make "due process of law" more than just a phrase in the Constitution.

For all of the foregoing reasons, we respectfully pray that this petition for certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15662

ABRAHAM CHAIFETZ, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided November 10, 1960

Mr. I. William Stempil, with whom *Mr. Abraham Chaifetz* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, WASHINGTON and DANAHER, *Circuit Judges*.

PRETTYMAN, *Circuit Judge*: Our appellant Chaifetz was indicted and tried on five counts for willfully attempting to evade federal income taxes for the calendar years 1951 through 1955, one count for each year. He was found not guilty on three counts and guilty on the third and fourth counts, relating to 1953 and 1954, respectively. He was given concurrent sentences on those convictions. This appeal followed.

In count three of the indictment, relating to the year 1953, Chaifetz was charged with the felony of willfully attempting evasion of income tax by filing a false and fraudulent income tax return.[1] Rule 31(c) of the Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of an offense necessarily included in

[1] Int. Rev. Code of 1939, § 145(b), 53 STAT. 63.

the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." Chaifetz contends the trial court erred in failing to submit to the jury as a lesser included offense the misdemeanor of willful failure to supply information required by law.[2]

Chaifetz asked the trial court to instruct the jury that, if it found he was not guilty of the felony but was guilty of the misdemeanor of failing to supply required information, it should find him guilty of the lesser offense. The entire requested instruction is in the margin.[3] Con-

[2] Int. Rev. Code of 1939, § 145(a), 53 STAT. 62 (amended by 57 STAT. 144 (1943)).

[3] The jury is instructed that with respect to the indictment alleging, for the years 1951 through 1955, a willful attempt to evade and defeat the payment of income taxes by the willful filing of a false and fraudulent return, there is within this charge a lesser included offense, namely, a violation of Section 145a of Title 26, 1939 Code, or Section 7203, Title 26 of the 1954 Code. This statute reads as follows:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

The jury is instructed that if from the evidence they believe that the defendant was not guilty of a felony or greater charge, but was guilty of the misdemeanor, namely, that he willfully failed to supply "any information" upon which his proper tax could have been computed, and you find it was done willfully, as this Court has defined the term to you, then it would be your duty to find him guilty of the lesser offense, and in your verdict you should say "guilty of violating the lesser included offense."

viction on the lesser offense was barred by the statute of limitations. The judge denied the request.

The applicable statute of limitations read:

> "No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, * * *."[4]

When this indictment was returned three years had elapsed since the commission of the alleged offense. So Chaifetz could not then be prosecuted, tried or punished for the lesser offense. We are of clear opinion that the trial judge was correct and that he should not have instructed as Chaifetz requested him to do.

The rule is well established that, when an accused is on trial for a felony (not barred by limitations), he cannot be convicted of a lesser included offense if the latter offense is barred. There are many cases on the point. References to a few, with their citations, will suffice. In *State* v. *King*[5] the Supreme Court of Appeals of West Virginia held that a person tried upon a felony indictment could not be convicted for an included misdemeanor barred by limitations. The defendant was indicted and tried for felonious assault. He was convicted of the misdemeanor of assault and battery. The trial court sentenced him. The appellate court set aside the verdict. It cited many cases in support of its view. And, to give another example, the Appellate Division of the Supreme Court of New York, in *People* v. *Di Pasquale*,[6] set aside a conviction for an attempt to commit murder, barred by limitations, when

[4] Int. Rev. Code of 1939, § 3748(a), 53 STAT. 461.

[5] 140 W. Va. 362, 84 S.E. 2d 313 (1954).

[6] 161 App. Div. 196, 146 N.Y. Supp. 523 (1914).

the trial was for murder, not barred. To the same effect is *Letcher* v. *State*,[7] in which the Supreme Court of Alabama remarked that "The law is well settled on the subject." Flatly, but without citations, the Supreme Court of Florida, in *Perry* v. *State*,[8] held that a trial court did not err in refusing to instruct a jury on lesser included offenses barred by limitations, where the indictment was for a felony not so barred. In *Spears* v. *State*[9] the Supreme Court of Alabama held:

> "The rule providing that every lesser offense is included in the one charged in the indictment applies and has reference only to every actionable offense and not the offenses which upon the face of the proceedings are barred by the statute of limitations, the operation of which rendered the court without jurisdiction to try and determine the so-called lesser offenses."

With many cases cited in support the rule is stated as follows in American Law Reports Annotated:

> "The rule supported by the overwhelming majority of cases is that one cannot be convicted of a lesser offense upon a prosecution for a greater crime which includes the lesser offense, commenced after the statute has run on the lesser offense."[10]

In cases in Texas[11] and Florida[12] it was held correct for the trial judge to instruct explicitly that the jury could not return verdicts of guilty to lesser offenses, ordinarily included, if convictions for those offenses were barred by

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[7] 159 Ala. 59, 48 So. 805 (1909).

[8] 103 Fla. 580, 137 So. 798 (1931).

[9] 230 Ala. 316, 160 So. 727 (1935).

[10] 47 A.L.R. 2d 888 (1956).

[11] McKinney v. State, 96 Tex. Cr. R. 342, 257 S.W. 258 (1923).

[12] Blackmon v. State, 88 Fla. 188, 101 So. 319 (1924).

limitations. The Supreme Court of Utah took a different view in *State* v. *Crank*[13] and held it to be error for the trial court even to mention to the jury lesser included offenses barred by limitations. Under either of these views the trial judge in the case presently at bar was correct.

As was pointed out by the Court of Appeals for the Sixth Circuit in *Benes* v. *United States*,[14] a statute of limitations in a criminal case, unlike such a statute in civil matters, is not merely a statute of repose but creates a bar to prosecution. Cases are cited in that opinion.

We had this problem in *Askins* v. *United States*,[15] and our present holding is in accord with that one. There the indictment was for first degree murder and the conviction was for murder in the second degree, the latter being then barred by limitations. We held the conviction to be barred, citing several of the cases hereinabove discussed.

It is true that the foregoing rule was developed as a response to efforts of zealous prosecutors to avoid the bar of a statute of limitations against lesser offenses. Faced with that bar, the Government upon occasion secured an indictment for a greater offense not so barred and then sought from court and jury a conviction of the lesser included offense. But the fact that in many of the cited cases the Government was seeking the instruction which would permit a verdict on the lesser offense, whereas in the case at bar the defendant is seeking that instruction, is immaterial. Instructions are the directions of the court as to the law in the case. They are the court's own directions. They are to be correct as to the applicable law. Who requests a given instruction makes no difference upon the problem of propriety. Of course a defendant

[13] 105 Utah 332, 142 P. 2d 178 (1943).

[14] 276 F. 2d 99 (1960).

[15] 102 U.S. App. D.C. 198, 251 F. 2d 909 (1958).

can sometimes waive an instruction to which he is entitled, or fail to claim one; but a requested instruction must truly reflect the applicable law, no matter who requests it.

Since Chaifetz could not, at the time of his trial, have been convicted of the misdemeanor of failing to file required information for the year 1953, he was not entitled to have the trial judge tell the jury it could, or should, find him guilty of that offense.

As we have noted, Rule 31(c) of the Rules of Criminal Procedure provides that an accused is entitled to instructions on "necessarily included" offenses. But that rule is not to be read as conferring a blanket right without qualification. Quite clearly it refers to offenses for which convictions might be had upon the proof adduced. Otherwise it would run counter to all accepted rules as to what a trial judge should or can charge a jury concerning permissible verdicts.

In the view which we take of this part of the case we do not reach the question whether the misdemeanor of failing to file required information was an offense "necessarily included" in the felony of willfully attempting to defeat or evade an income tax.

In count four the indictment charged willful attempt to evade income tax for 1954. The misdemeanor of willful failure to supply required information was not barred by limitations and was submitted to the jury by the trial court. The jury returned a verdict of "guilty of failing to supply information required by law". Chaifetz argues here that the verdict, omitting as it did the word "willful", was in effect a verdict of acquittal. The Government says that the conviction on this fourth count cannot stand, the premise for its conclusion being that this misdemeanor was not "necessarily included" in the felony charged. Therefore, the Government says, it was error for the trial court to submit the misdemeanor. The sentence on count

four is less than, and concurrent with, that imposed on count three. Since we have found the conviction on the third count must be sustained, under familiar principles it is unnecessary for us to consider the questions raised with respect to the fourth count. We do not consider them.

It is further alleged that appellant's cause as to all counts was prejudiced by the conduct of the prosecutor and the deputy marshal, by the jury's failure to comply with certain admonitions from the court, and by the conduct of the court itself. We have carefully examined these and the other arguments presented. We find no error requiring reversal.

Affirmed.

APPENDIX B

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States:

Fourth Amendment.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *

Fifth Amendment.—No persons shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Sixth Amendment.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *, and to be informed of the nature and cause of the accusation; * * *, and to have the Assistance of Counsel for his defence.

Title 26, U.S.C.A. sec. 145 (a)—1939 Internal Revenue Code:

Any person * * * required by law or regulations made under authority thereof to make a return * * *, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of * * * any tax imposed by this chapter, who willfully fails to pay such * * * tax, make such return * * *, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of the prosecution.

Title 26, U.S.C.A. sec. 145 (b)—1939 Internal Revenue Code:

* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thergof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 26, U.S.C.A. sec. 7201, 1954 Internal Revenue Code:

Attempt to evade or defeat tax. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 U.S.C.A. sec. 7203, 1954 Internal Revenue Code:

Any person required under this title to * * * keep any records, or supply any information, who willfully fails to pay such * * * tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 26, U.S.C.A. sec. 811, 1939 Internal Revenue Code:

Gross Estate (Estate Tax-basic tax, citizens or residents of the United States.—The value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(c) Transfers in contemplation of, or taking effect at, death

(1) General Rule. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(C) intended to take effect in possession or enjoyment at or after his death.

(e) if decedent within a period of 3 years ending with the date of his death transferred on interest in property—such transfer shall be deemed to have been made in contemplation of death. • • •

Title 26, U.S.C.A. sec 812. Internal Revenue Code, 1939 IRC.:

Net estate. For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

(a) exemption. An exemption of $100,000. • • •

Title 26 U.S.C.A. sec. 1000, Chapter 4—Gift Tax.—Imposition of Tax.—

(a) Transfers subject to tax; certin gifts not affected. For the calendar year 1940 and each calendar year

thereafter, a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

Federal Rules of Criminal Procedure:

Rule 31 (c): Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 43. Presence of the defendant. The defendant shall be present * * * at every stage of the trial * * *.

Rule 52 (b). Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.